

APPROVED

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Tuesday, July 13, 2004 Rockville, Md.

The County Council for Montgomery County, Maryland convened in the Council Hearing Room, Stella B. Werner Council Office Building, Rockville, Maryland, at 9:19 A.M. on Tuesday, July 13, 2004.

PRESENT

Steven A. Silverman, President	Thomas Perez, Vice President
Phil Andrews	Michael Knapp
Howard Denis	George Leventhal
Nancy Floreen	Marilyn J. Praisner
Michael L. Subin	

The President in the Chair.

The invocation was presented by Father JohnENZler, Our Lady of Mercy, Potomac.

President Silverman announced that Councilmember Leventhal is delayed on Council business and should arrive shortly.

SUBJECT: Proclamation to the Maryland-National Capital Park and Planning Commission, Recipient of the Congress for the New Urbanism's 2004 Charter Award of Excellence

The proclamation was presented by Councilmember Andrews to Mr. Berlage, Chair, Mr. Carter, Ms. Tallant, Ms. Clemens, M-NCPPC; Mr. Lawrence, Mr. Kraus, JBG Companies; Mr. Nichols, CHK Company; and Pat Harris, Holland and Knight Law firm.

SUBJECT: Proclamation to the Silver Spring Historical Society Proclaiming the Week of July 11-17, 2004, as Fort Stevens Week

The proclamation was presented by Councilmembers Denis and Perez to Ms. Slatick and Ms. Urban from the Silver Spring Historical Society.

SUBJECT: Agenda and Calendar Changes

Legislative Analyst Lauer directed attention to an addendum to the agenda, adding for introduction Bill 23-04, Contracts and Procurement – Local Small Business Reserve Program, sponsored by Council President Silverman and Councilmembers Leventhal, Perez, and Floreen. She noted that action will be taken on expedited Bill 19-04 during the afternoon legislative session.

SUBJECT: Approval of Minutes

ACTION: Approved the minutes of May 14, June 17, and June 22, 2004, as amended.

Councilmember Subin made the motion. Councilmember Leventhal was temporarily absent.

SUBJECT: Receipt of Petitions

The Council acknowledged receipt of petition 010145 from the business and property owners in the Burtonsville Business District in support of a proposal to amend the Fairland Master Plan.

Councilmember Praisner expressed the view that the request to reopen the Master Plan may not be necessary, noting that she has spoken with Planning Board Chair Berlage and the Chair of the Advisory Committee and believes that an approach can be developed which will address the concerns of the business and property owners in the Burtonsville Business District.

SUBJECT: Consent Calendar

Councilmember Denis spoke in support of the resolution to bring major league baseball to the Washington, D.C. area and referred to Walter Johnson, the Washington Senators pitcher, who lived in Bethesda, and served on the Board of County Commissioners which was the predecessor to the County Council. He pointed out that the County's hotels, restaurants, and tourist attractions would benefit from having a major league baseball team, as well as the children of all ages who have been deprived of major league baseball for thirty three years.

Speaking in support of the resolution, Councilmember Praisner said she would cosponsor it and expressed the hope that the Council can make a strong statement to bring major league baseball to the area.

ACTION: Adopted the consent calendar:

Introduced a resolution to support State Financing for the Rehabilitation of Spring Garden Apartments in Silver Spring;

Introduced a resolution to support State Financing for the Rehabilitation of Chevy Chase Lake Apartments in Chevy Chase;

Introduced a resolution to consolidate the issuance of certain authorized bonds;

Introduced a resolution to consolidate new authority to issue commercial paper bond anticipation notes with all previously authorized notes;

Introduced a resolution to approve the FY05 schedule of revenue estimates and appropriations;

Introduced a resolution to endorse the Maryland Economic Development Assistance Authority and Fund (MEDAAF) grant to the Mills Corporation;

Resolution 15-674, extending until October 4, 2004 Temporary Executive Regulation 8-04T, Emergency Taxicab Fare Surcharge;

Resolution 15-675, approving Executive Regulation 6-04AM, Amendments to Personnel Regulations – Sick Leave Donor Program;

Resolution 15-676, approving a supplemental appropriation to the FY04 Operating Budget and amendment to the FY03-08 Capital Improvements Program, Technology Investment Fund (TIF), for the Enterprise Resource Planning Requirements Study, in the amount of \$395,000;

Resolution 15-677, confirming the County Executive appointments of the following persons to the Local Management Board for Children, Youth, and Families: David T. Jones, and Ellie N. Salour;

Resolution 15-678, confirming the County Executive appointment of the following persons to the Mental Health Advisory Committee: Miriam L. Yarmolinsky, Kim-Renee Allen, Celia Young, Denise Fay-Guthrie, Randall R. Myers, Officer Joan Logan, Myriam Schinazi, and Kenneth Ratcliffe;

Resolution 15-679, confirming the County Executive appointments of the following persons to the Silver Spring Urban District Advisory Committee: Bryant F. Foulger, Dale Mangum, Robert R. Middleton, and Charles Atwell;

Resolution 15-680, confirming the County Executive appointments of the following persons to the Upcounty Citizens Advisory Board: Heinz Bachmann and David Whitcomb;

Resolution 15-681, confirming the County Executive appointments of the following persons to the Wheaton Urban District Advisory Committee: Filippo Leo and Brett Schneider;

Resolution 15-682, supporting Major League Baseball in the District of Columbia;

Introduced a supplemental appropriation to the FY05 Operating Budget of the Support for the Arts and Recreation Nondepartmental Account, for the Partnership for Arts and Recreation Initiative, in the amount of \$1,500,000.

Councilmember Knapp made the motion. Councilmember Leventhal was temporarily absent.

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS A DISTRICT COUNCIL FOR THAT PORTION
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT
WITHIN MONTGOMERY COUNTY**

SUBJECT: **Resolution to dismiss Development Plan Amendment (DPA) 01-2, Auto Park Investment Partnership No. II**

ACTION: Adopted Resolution 15-683, dismissing the subject DPA.

Councilmember Praisner made the motion. Councilmember Leventhal was temporarily absent.

Later in the day, Councilmember Leventhal stated that had he been present for the vote to dismiss DPA 01-2, he would have voted in the affirmative.

SUBJECT: **Resolutions to Approve Use of Advance Land Acquisition Revolving Fund (ALARF) for Acquisition of Real Property: Woodstock Equestrian Park Addition Lots 6,7, and 8, Beallsville Property; and Linthicum East Elementary School Site**

The Council had before it the memorandum and attachments from Senior Legislative Analyst Wilson, dated July 7, 2004.

ACTION: Introduced the subject resolutions.

Councilmember Praisner requested and received verification from Ms. Wilson, Board of Education, that this refers to the existing Clarksburg Elementary School and its relocation, noting that the Clarksburg Master Plan identifies the transitway as traversing the Clarksburg Elementary School site.

SUBJECT: Executive Regulation 26-03AM, Cable Modem Service Standards

The Council had before it the memorandum and attachments from Legislative Analyst Healy, dated July 9, 2004; and an addendum memorandum from Ms. Healy, dated July 12, 2004, attaching comments from the Office of Cable and Communication Services and the Office of the County Attorney on amendments to the Executive Regulation proposed by Councilmembers.

Councilmember Knapp provided background information concerning his preparation for the discussion on cable modem service standards, and noted that on June 29, when the cable modem issue was first scheduled for Council action, he was prepared to introduce his amendment, but the issue was deferred. He said that at Ms. Praisner's request at that meeting, he and other Councilmembers made their proposed amendments to the Executive Regulation available to Ms. Praisner. Mr. Knapp said that he was surprised to find that the Committee met on July 6 and reviewed the amendments and debated the issues involved without receiving feedback from Councilmembers who do not serve on the MFP Committee. Mr. Knapp expressed concern about the handling of this matter by the Committee, the press release that was issued by the Management and Fiscal Policy Committee (MFP) Committee on July 7, 2004, and the press conference that was held the next day. He said that he perceived the press release to indicate that the proposed amendments were anti-service, and he was concerned about this, especially since Councilmembers who offered the amendments had not had the opportunity to comment on them.

In discussing the fact that the Executive Regulation appears to be the first of its kind in the country, Mr. Knapp noted the challenge that this presents to the County to attempt to strike a balance on the requirement of a significant amount of telecommunication infrastructure and the needs of consumers whom Councilmembers represent. Mr. Knapp provided details regarding research that he undertook in connection with his proposed amendment, including actions by the Federal Communications Commission (FCC) related to cable modem service, and issues related to the response of the National Association of Counties (NACo) to the FCC action. Mr. Knapp stressed the importance of the cable modem regulation, stating it involves a significant national discussion and one in which the County is interested in pursuing in a productive way.

Councilmember Praisner, expressed concern regarding Councilmember Knapp's comments, and provided background information concerning the issue, including the previous Council's adoption of legislation that puts in place a consumer compliance structure and the decision made by the Council to address cable modem standards through executive regulations. With respect to the issue raised by Mr. Knapp, Ms. Praisner said that the MFP Committee functioned in the traditional manner of a Council committee in its review of the proposed amendments to the Executive Regulation. She said that in response to the Council's deferral of action on the Executive Regulation, as Chair of the MFP Committee, she requested that Councilmembers provide any amendments or suggestions to her so that a committee packet could be prepared for the Committee's review. She noted that this is the typical way issues that are brought before the Council are considered. With respect to the amendments recommended by three Councilmembers for consideration, Ms. Praisner said that they were similar to

amendments that the MFP Committee and the County Executive had already considered. Nevertheless, the Committee held a meeting on the proposed amendments and made recommendations. Ms. Praisner pointed out that the Committee's meeting was listed on the Council's Committee agenda, and that this was an open meeting with the Committee members in attendance who could be present at that time. Councilmember Praisner expressed the view that it is inappropriate to discuss motivations beyond customer service and County considerations and to introduce NACo into the issue, and that although other people have highlighted the fact that Montgomery County is the first county in the United States to address this issue through regulations, the regulation before the Council is intended to respond to the concerns of the County and its residents involving a the myriad of issues.

Councilmember Subin expressed the view that the chairs of Council committees have discretion in the management of the meetings they chair, but that he does not want his statement to be interpreted as for or against Mr. Knapp's comments but rather that they refer only to the authority of a Council committee chair to handle their committee meetings in the way the Committee chairs believe is most appropriate. In discussing related issues, Mr. Subin recalled actions he took previously regarding the FCC and the cable industry that resulted in legislation which made the County a more competitive environment for cable television. He discussed his concern about inappropriate accusations that are sometimes made when there is disagreement over issues, and expressed the view that Councilmembers should not be accused of being anti-consumer on the basis of their vote on an issue. Mr. Subin said that he supports some of the proposed amendments, a number of which are his, because he views some of the language in the Executive Regulation as legally questionable and anti-competitive.

Councilmember Andrews expressed the view that the County is fortunate to have Ms. Praisner serving as Chair of the MFP Committee because of her expertise on cable issues, and noted how much he appreciates working with her. He said that as Ms. Praisner mentioned, the Committee process followed the normal procedure in its review of the proposed amendment, and he believes that it is beneficial to the Council to have the Committee recommendation on the significant amendments that are offered. He said that he would not be surprised if Montgomery County is the first county in the country to adopt executive regulations on cable modem service, pointing out that Councilmember Praisner introduced the legislation two years ago, which the Council supported, that required the County Executive to issue the standards that are before the Council today.

Councilmember Floreen, in discussing her introduction to discussions on cable modem service, expressed the view that this is primarily about consumer protection for access to the internet and said that later in the meeting, she will share with Councilmembers her personal experience in this regard.

President Silverman directed attention to the proposed amendments set forth in the staff memorandum on pages 2-9; and comments from the Office of Cable and Communication Services and the Office of the County Attorney attached to the addendum staff memorandum. Mr. Silverman said that the proposed amendments are only suggestions to the County Executive, and if any of them are approved by the Council, they will be transmitted to the County Executive who will make a determination on whether to incorporate the amendments

into the Executive Regulation. Mr. Silverman said that the Executive Regulation is scheduled for final action by the Council on July 27, 2004.

In introductory comments related to the Council's review of the proposed amendments, Councilmember Praisner said that she has asked outside counsel to be available should Councilmembers have questions. She said that representatives of the Office of Cable and Communication Services (OCCS) and the Office of the County Attorney are present because they commented on the appropriateness of issues as the Committee considered them. Ms. Praisner noted that technical staff is also available at the meeting to respond to any issues or questions the Council may raise.

President Silverman directed the Council's attention to the proposed amendments and the MFP Committee's recommendations as summarized by Council staff in the staff memorandum.

With respect to the amendment proposed by Councilmember Subin for §3, Definitions – Normal Operating Conditions, Councilmember Praisner explained that the Committee rejected the proposed amendment for the reasons described on page 3 of the staff memorandum.

Councilmember Subin discussed his reasons for proposing the deletion of the words "and the unforeseeable" from §3, and suggested the need to clarify the language in this section. He expressed the view that the term "unforeseeable" is too vague. Mr. Subin said that in suggesting the need for clarity, his purpose is to avoid future problems, not because he is attempting to support either the consumer or cable companies on this issue.

Councilmember Silverman requested information regarding the number of cable modem subscribers that Comcast Cable Communications, Inc. serves in order to make a more accurate comparison between the number of complaints Comcast receives from subscribers for cable modem service and the number of Comcast's cable modem subscribers. Ms. Bogage, Director of Government and Community Affairs, Comcast Cable Communications, Inc., stated that a rough estimate of the number of cable modem customers served by Comcast is around 100,000, and that she cannot be more specific than this because Comcast considers this proprietary information.

With respect to Councilmember Silverman's question concerning the County Executive's response to Councilmember Subin's proposed amendment, Mr. Pasternak, Special Assistant to the County Executive, stated that as he mentioned in his email to the Council last week, the County Executive supports the amendment.

In response to Councilmember Silverman's question regarding the County Attorney's opinion on Mr. Subin's proposed amendment, Mr. Royalty, Associate County Attorney, said that he was not addressing a public policy issue when he suggested that the removal of the word "unforeseeable" could encourage the purchase of substandard equipment and software which might ultimately lead to an excuse to circumvent the regulations should the equipment fail. Mr. Royalty said that he views this as a possible "legal loophole." During

discussion, Councilmember Subin suggested substituting the word unpredictable for the word [unforeseeable].

During discussion, Ms. Bogage said that the language in the Executive Regulation concerning the failure of equipment or software would apply only to the owner or lessee of the equipment or software.

Councilmember Knapp expressed the view that the issue is whether Comcast should be held responsible for either predictable or unpredictable issues associated with equipment that has not been purchased by Comcast, and that he believes Comcast could not be held responsible for failure of equipment or software to operate properly that is not owned, leased or licensed by Comcast.

Councilmember Perez directed attention to the second page of a memorandum from Mr. Pasternak, dated June 9, 2004, and included in the Council's packet on page ©13. Mr. Perez said that in the first sentence, the first paragraph on ©13, it states that, "We would, however, support a change to the definition that adds 'the unforeseeable failure of equipment or software not owned, leased or licensed by the cable operator that provides access to the Internet'." During discussion, Mr. Perez noted that the County Attorney and the County Executive do not appear to be in agreement on the amendment, and requested Mr. Pasternak's comments in this regard.

Mr. Pasternak said that the positions held by Associate County Attorney Royalty and the County Executive differ because it is Mr. Royalty's responsibility to highlight legal issues and possible loopholes. He said that the Executive Regulation imposes customer service standards on items such as telephone availability, installation, and scheduling, and that cable operators are required to meet these standards under "normal working conditions." The Executive Regulation establishes a nonexclusive list of conditions that do not fall under the definition of normal operating conditions and are not within the control of the cable operator. One of those is whether the failure of equipment or software that is not leased, owned, or operated by the cable company is foreseeable. If that failure occurs, it is not within the control of the cable operator, it is not a normal operating condition, and the standards that must be met would not apply in those conditions. Mr. Pasternak noted the debate that might occur in the future if the word "unforeseeable" is retained, and said the memorandum he sent the Council in June 2004 was a response to a request to include for the first time the third party failure of equipment or software, and in incorporating the language into the Executive Regulation, he included the word "unforeseeable." He said that in considering the amendment, including whether a significant change should be made in the customer protection, he concluded that deleting the word "foreseeable" would have a minimal impact, if any, on the regulation.

Councilmember Perez pointed out that the term "foreseeable" has a legal connotation and implies that a person with reasonable prudence has to take appropriate steps, and a strong argument for its retention would be to ensure that an entity is doing aggressive monitoring of people with whom it subcontracts, and suggested that this might be part of the rationale behind the position of the Cable Administrator and the Cable Communications Advisory Committee (CCAC) on this issue.

Councilmember Leventhal reviewed the issues discussed and the positions presented thus far on Councilmember Subin's proposed amendment, and suggested that the Council attempt to reach some reasonable accommodation as to the meaning of the words in question. With respect to an issue raised by Councilmember Perez regarding subcontractors who were licensed to operate equipment, Mr. Leventhal expressed the view that this would not be a good argument either for retaining the word "unforeseeable."

Councilmember Floreen, in discussing comments made by Councilmember Knapp and Mr. Pasternak regarding the words "failure of equipment or software not owned, leased, or licensed by the cable operator," expressed the view that the use of the word "unforeseeable" in this context makes it a legal issue. Ms. Floreen described the experience that she and her husband had in obtaining and maintaining cable modem service, and stated that based on her experience, she believes this is a complicated set of arrangements in which it is easy for a person to blame one source or another for the problem, but that most people who are not experts on technology issues are dependent upon varying and often contradictory interpretations of equipment or software problems that may occur. She pointed out that this is a consumer protection issue and involves the question of who is responsible for equipment failure, and in the situation being discussed, Comcast would not be responsible. She said that there are many incidents that could be predicted and that that might affect someone's cable modem service, but it does not make sense to attempt to place this responsibility on an entity that is not responsible and who does not own the equipment or control it. Ms. Floreen said that she supports the deletion of the word "unforeseeable" because it suggests that one operator is going to anticipate, and be held responsible for, all equipment and software failures that might possibly occur. She said that she believes there is a limit to what the Council can expect to accomplish in its attempt to regulate business practices related to technology, and said that she believes the issue before the Council is what the Council can reasonably expect a company to control.

Councilmember Andrews stated that the principle at issue is accountability, and that the term foreseeable or unforeseeable represents a well established legal concept that implies that an entity is accountable for something that is reasonably predictable. Mr. Andrews suggested that "foreseeability" would reasonably apply in a situation where a cable operator inadvertently seriously damages leased equipment that subsequently fails and causes loss of service. He expressed the view that the deletion of the word "unforeseeable" provides a loophole in the Executive Regulation.

President Silverman, responding to Councilmember Leventhal's question, stated that he intends to have the Council vote on both of Councilmember Subin's proposed changes in §3, Definitions – Normal Operating Conditions. Mr. Leventhal objected, pointing out that the Council has not discussed the second change which is the insertion in the first sentence, on page 3, of the staff memorandum, after the words "access to the internet," the words and violations of subscriber agreements by the subscriber. Councilmember Leventhal moved, duly seconded, to divide the two issues in the proposed amendment for voting purposes.

ACTION: Agreed to divide the two issues in Councilmember Subin's motion for voting purposes.

YEAS: Denis, Leventhal, Andrews, Praisner, Perez
NAYS: Floreen, Subin, Knapp, Silverman.

Councilmember Leventhal made the motion.

Approved Councilmember Subin's amendment to §3, Definitions – Normal Operating Conditions, in the Executive Regulation, to delete in the first sentence, on page 3, of the staff memorandum, after the word "attacks;" the words [and the unforeseeable].

YEAS: Floreen, Subin, Leventhal, Knapp, Silverman
NAYS: Denis, Andrews, Praisner, Perez.

Councilmember Subin made the motion.

The Council turned its attention to the second issue in Mr. Subin's proposed amendment to §3, Definitions – Normal Operating Conditions, the proposed insertion in the first sentence, after the word "Internet," the words and violations of subscriber agreements by the subscriber.

Councilmember Leventhal quoted the following sentences from page 2, the second paragraph, beginning with the fourth sentence, of the addendum staff memorandum, the responses to the proposed amendments from the Office of Cable and Communication Services. "If an individual subscriber violates a subscriber agreement, such an action already frees the cable company from responsibility with regard to the violation itself. That does not affect the time in which the cable company is able to answer their phones or contact customers or respond to service calls. Inserting 'violations of subscriber agreements by the subscriber' simply doesn't make sense." Ms. Lawton, responding to Councilmember Leventhal's question, explained the meaning of "normal operating conditions" and "abnormal operating conditions" and noted the lack of control the County has concerning subscriber agreements.

Councilmember Leventhal directed attention to page 3 of the staff memorandum, the third paragraph, the penultimate sentence: "On the other hand, a subscriber's use of the service in a business enterprise in violation of the subscriber agreement may very well affect 'Normal Operating Conditions' as it relates to the cable operator's ability to meet the standards for restoring service that goes down."

In response to Councilmember Leventhal's question, Mr. Pasternak stated that the regulation applies to residential use, and that his understanding is that business use of a cable modem would be in violation of the residential subscriber agreement. Ms. Bogage agreed that the operation of a home-based business on the cable modem service provided by Comcast would be a violation of the residential subscriber agreement. She said that Ms. Lawton is correct in that some of these violations would result in a single service interpretation which would not affect the compliance numbers on the larger scale, but that a subscriber could engage in an activity in violation of the residential subscriber agreement that might cause an outage and affect more than

one subscriber and impact Comcast's ability to respond. Ms. Bogage said that this is why the amendment is proposed. Ms. Lawton explained that although a home-based business is excluded under the residential subscriber agreement, the consumer operating such a business would be protected under the County's franchise agreement with Comcast. Mr. Royalty confirmed Ms. Lawton's statement, noting that he sees no exclusion pertaining to cable modem service in the franchise agreement, nor in Chapter 8A of the County Code.

Mr. Pasternak said that the issue of a violation of the residential subscriber agreements is the reflection of the fact that a third party could use the system in a manner that would violate the subscriber agreement and set in motion a series of circumstances beyond the control of the cable operator, and, therefore, could result in a situation in which the which the operator should not be required to meet the performance standards. The issue that the Executive Branch has with a blanket exclusion of the violation of subscriber agreements is that the violation may not be the cause of the condition that would excuse compliance. Referring to his memorandum, Mr. Pasternak said that if the violation by the subscriber could be tied to the condition which creates the inability to comply, then it is a situation not in control of the cable operator and it would not be a normal operating condition. In response to Councilmember Leventhal's observation that Councilmember Subin's proposed amendment does not address the issue, Mr. Pasternak suggested the need to retain Mr. Subin's concept and focus it on the fact that the violation would need to be the cause of the condition that creates the noncompliance.

During discussion, Mr. Royalty suggested that a failure of the system might be the result of customers adding servers, routers, and other equipment to their computer. Ms. Lawton questioned how that would impact the ability of Comcast to answer its telephone or achieve the established standards that represent responses to customers and do not relate to technology.

Councilmember Leventhal suggested amending Councilmember Subin's amendment to include language to state that violations of the subscriber agreements by the subscriber that create the condition would not be within the control of the cable operator. Councilmember Subin accepted the language change as a friendly amendment.

Discussion was held concerning the measurement of the customer service standards and reporting requirements as this relates to incidents that occur that are in violation of the subscriber agreements; the inclusion of internet access in the County's franchise agreement and comments from Ms. Bogage regarding her view that language in the County Code supersedes language in the franchise agreement.

ACTION: Approved Councilmember Subin's amendment, as amended by Councilmember Leventhal, to §3, Definitions – Normal Operating Conditions, to insert in the first paragraph, after the words “access to the internet” the words “and violations of the subscriber agreements by the subscriber that create or cause the condition.”

Councilmember Subin made the motion.

With respect to the amendment proposed by Councilmember Subin for §3, Definitions – System Outage or Outage, Councilmember Praisner explained that the Committee rejected the proposed amendment for the reasons described on page 4 of the staff memorandum.

Councilmember Subin said that his rationale for the deletion of the words [or should be known] in the third line, under System Outage or Outage, is similar to the rationale for the previous proposed amendment. He explained that he believes the three words are ambiguous and could be easily challenged in court.

Mr. Pasternak said that he believes the question involves the attempt to strike a balance between technology and the expectation of consumers, and that he has been advised that the cable company cannot discern whether the consumer has gone off line or whether there is a system outage.

Ms. Bogage explained that areas covered by cable modem are divided into geographic nodes, and that if enough customers (sometimes ten or more) go off line at the same time, the company investigates to determine whether a system outage has occurred; otherwise, the company relies on consumers to notify the company of outages.

Mr. Afflerbach, engineer, Columbia Telecommunications, technical consultant for the Council, stated that other cable companies that he is familiar with have had the difficulty described by Ms. Bogage in determining whether consumers have gone off line or whether an outage has occurred. With respect to the problem of determining when outages occur, Mr. Afflerbach said that he believes the monitoring of outages should not be the sole responsibility of the consumer, that a higher threshold than ten subscribers might be used if the cable company is having difficulty with identifying outages for ten subscribers, and that the cable company should develop a system to monitor the outages.

Councilmember Perez suggested that Councilmember Subin's proposed amendment be modified to include language that reflects "a rule of reason," i.e., a reasonable entity standard. Mr. Perez suggested adding after the words "or should be known," the words through the exercise of ordinary due diligence. Councilmember Subin accepted Mr. Perez' suggestion as a friendly amendment.

Councilmember Knapp requested and received clarification from Mr. Pasternak regarding the definition of the words "known" or "should be known," as the terms are used in the Executive Regulation; and in response to his question about whether a higher threshold than ten subscribers should be used to identify outages, Mr. Pasternak stated that the higher the number, the more people would be without service before an investigation is undertaken of the outage. Ms. Lawton pointed out that ten is the number that is used in the Executive Regulation concerning video consumers.

During discussion, and in response to Councilmember Leventhal's question, Ms. Bogage noted her concern regarding how the term "ordinary due diligence" will be interpreted.

Councilmember Praisner stated that she agrees with the proposed amendment, as amended, and other members of the MFP Committee expressed no objection to the modified amendment.

ACTION: Approved Councilmember Subin's amendment, as amended by Councilmember Perez, to §3, Definitions –System Outage or Outage, to read: System Outage or Outage: A Service Interruption affecting more than ten (10) subscribers to a Cable Modem Service, as reported by the subscribers, or as otherwise becomes known or should be known through the exercise of ordinary due diligence to the cable operator, in the same node serving area.

Councilmember Subin made the motion.

With respect to the amendment proposed by Councilmember Silverman for §4, Cable Modem Service Standards – Scheduling and Completing Service, Councilmember Praisner explained that the Committee rejected the proposed amendment for the reasons described on page 5 of the staff memorandum.

Mr. Pasternak said that the Executive Branch's position is the approach used in the proposed amendment. He explained that the proposed regulation requires that 95% of the time, measured quarterly, repairs must be completed within 36 hours, and the proposed amendment breaks it down and requires that 95% of the time repairs must be initiated within 24 hours and 75% of the time repairs must be completed within 36 hours. Mr. Pasternak said that the proposed amendment recognizes technology difficulties and the incentive the company would have to complete repairs after the repairs are initiated within 24 hours. He said that this is the reason he believes the proposed amendment represents a reasonable approach.

In response to Councilmember Silverman's question regarding the business practice of Comcast, Ms. Bogage said that Comcast's business practice is "same day service." If a customer calls, even if it is not for service interruption, the goal of Comcast is to schedule service for the same day or the next day, and noted that Comcast's record indicates that this goal is being achieved. She said that Comcast is complying with the requirement on the video side of completing repairs within 24 hours, 95% of the time, and it has been in compliance with that requirement throughout 2004. Ms. Bogage explained that cable modem is a more complex service than video service, and that extensive repair work would take more time. She pointed out that the language in the proposed amendment that calls for initiating repairs within 24 hours 95% of the time is language that is taken from the FCC standard for cable television service. During discussion, Ms. Bogage said that when a customer calls the cable company to report a service interruption and a visit is scheduled to the customer's home, it is necessary for the customer to be home when the technician arrives even if the repair is found to be outside of the home. She said that the repair is completed on the initial visit when possible and if not, another visit is scheduled

which would require additional time. During discussion, Councilmember Perez noted that if the Council had the benefit of additional data, it could make a more informed judgment on this issue.

Mr. Miller, Miller and VanEaton, LLP, special counsel to the County Executive clarified issues raised regarding regulations that local exchange telephone companies face when they offer digital subscriber line (DSL) facilities and services in the County, in accordance with the information contained in his memorandum to Mr. Royalty, dated July 12, 2004.

ACTION: Defeated Councilmember Silverman's amendment to §4, Cable Modem Service Standards – Scheduling and Completing Service, as more particularly set forth on pages 4 and 5 of the staff memorandum.

YEAS: Floreen, Subin, Knapp, Silverman

NAYS: Denis, Leventhal, Andrews, Praisner, Perez.

With respect to the amendment proposed by Councilmember Knapp for §4(d), Interruption of Service, Councilmember Praisner explained that the Committee rejected the proposed amendment for the reasons described on page 6 of the staff memorandum.

Councilmember Knapp stated that he appreciates the Committee's perspective, and explained that he offered the amendment because of his previous experience at the Celera Genomics Group. He discussed the conclusion that he reached regarding the limitation of the timeframe in which planned maintenance would occur and the requirement that a specific entity would be notified in advance of the anticipated service interruption, so that subscribers to the service would have a point of contact should they have questions regarding a service interruption.

Ms. Lawton suggested the alternative of having subscribers request notification from the cable company when planned maintenance is scheduled.

Ms. Bogage said that it would not be possible at this time for Comcast to email customers since email service is not provided locally, but it might be possible in the future to post planned maintenance on Comcast's web site. With respect to Mr. Knapp's proposed amendment, Ms. Bogage said that Comcast is following this procedure currently. She said that this is the requirement under the franchise agreement and the practice that Comcast has followed since she has been employed by Comcast which is more than three years. Ms. Bogage said that only a few complaints have been received concerning this practice.

Councilmember Leventhal expressed the view that 24-hour notice for planned maintenance is adequate, and that Comcast should be able to email customers that request to be notified of service interruptions that are anticipated to occur. Mr. Leventhal discussed with Ms. Bogage issues related to service interruptions and notification to all customers, with Ms. Bogage expressing the view that it would be difficult to notify customers by mail of a system outage because of planned maintenance because it is usually not planned that far in

advance of the time it is scheduled, but it might be possible to provide notice to customers by a “crawl notification” on a television channel.

ACTION: Approved Councilmember Knapp’s amendment to §4(d), Interruptions of Service, as more particularly set forth on page 5 of the staff memorandum.

YEAS: Floreen, Subin, Leventhal, Knapp, Silverman

NAYS: Denis, Andrews, Praisner, Perez

Councilmember Knapp made the motion.

With respect to the amendment proposed by Councilmember Subin for §4(e)(4), Notice to Subscribers, Councilmember Praisner explained that the Committee rejected the proposed amendment for the reasons described on page 6 of the staff memorandum.

Mr. Pasternak said that the Executive Branch has been working with Comcast for some time on notification, and that with respect to Councilmember Subin’s proposed amendment, he suggested adding a provision that says that all forms and notices distributed to customers that describe customer service policies and procedures shall be submitted for County review. Mr. Pasternak said that the County has the ability under the franchise agreement to review customer service policies and procedures and if the County believes that there is a violation of the franchise agreement or the consumer protection laws, the County could pursue the matter even in the absence of a regulation.

Councilmember Subin accepted Mr. Pasternak’s suggestion to require all forms and notices to be subject to County review within a five-day period. Mr. Subin expressed the view that this requirement sets a bad precedent by requiring forms and notices of businesses to be reviewed by the County, but in this case, the Executive Regulation should be consistent with the franchise agreement.

In response to Councilmember Silverman’s question, Mr. Pasternak said that if the County does not have the opportunity to review the forms and notices within the five-day period, it can request an extension of time from the cable company. He said that if the County had approval rights, and the cable company refused to extend the time when requested, the company would be free to send the forms and notices without the County’s involvement. However, this would not occur in this case since the forms and notices would be submitted to the County for review only.

Based on the discussion of this issue, Councilmember Subin suggested that the language be revised to read: All forms and notices distributed to customers that describe customer service policies and procedures shall be subject to prior County review to ensure they do not violate the franchise agreement or any other applicable law.

Councilmember Praisner said that she supports the proposed amendment with the stipulations that it does not change the County's approval authority for the cable franchise, and that the notice or distribution or information being provided is in a form not yet printed.

ACTION: Approved an amendment to §4(e)(4), Notice to Subscribers, as modified by Councilmember Subin to read: All forms and notices distributed to customers that describe customer service policies and procedures shall be subject to prior County review to ensure they do not violate the franchise agreement or any other applicable law.

Councilmember Subin made the motion.

With respect to the amendment proposed by Councilmember Subin for §4(g), Rebate Policy, Councilmember Praisner explained that the Committee rejected the proposed amendment for the reasons described on page 7 of the staff memorandum.

In discussing the proposed amendment, Mr. Pasternak expressed the view that the phrase "under normal operating conditions" is not necessary because compliance standards do not apply when "normal working conditions" do not exist, and force majeure provisions excuse compliance. He said that the proposed change requiring a customer to request a rebate is inconsistent with other industries that are regulated by the FCC, and that the Executive Branch is not opposed to the change. Mr. Pasternak suggested that if the Council approves the proposed amendment, the rebate apply to a 24 hour period, not 36.

Councilmember Andrews noted that a subscriber automatically receives a credit of 10% of the subscriber's normal bill for each 24 hour period that service is out after it was scheduled to be restored. He pointed out that under the proposed amendment, the rebate would be reduced to \$1.66 for each 24 hour period based on a monthly bill of \$50. Mr. Andrews said that in his opinion, few people would take the time to telephone the cable company to obtain a small rebate and he believes that cable modem customers should not be placed in this situation to obtain a rebate that they deserve to have credited to them automatically for service paid but not received. Ms. Bogage clarified that rebates for outages are not automatic and have to be initiated by Comcast's customers. She said, however, that customers do request rebates frequently and that Comcast agrees with Mr. Andrews that customers should not pay for what they are not receiving.

Councilmember Leventhal said based on Mr. Pasternak's comments and his own understanding of the proposed amendment, he believes the rebate should not have to be initiated by the subscriber, Comcast should estimate and pro-rate the credit for the period of time of the service outage, and the time period should be 24 hours, not 36. Councilmember Leventhal proposed that Councilmember Subin's amendment be amended to delete in the first line of the proposed amendment, on page 7 of the staff memorandum, the words [under normal working conditions] and in the last sentence of that paragraph, the words [upon request by the subscriber]. Councilmember Subin accepted Mr. Leventhal's proposed amendment as a friendly amendment. Councilmember Leventhal suggested adding introductory language, as recommended by Council staff, to make it clear that video and cable modem services are treated differently because they

pose different and unique challenges, and that the treatment of the cable modem service should not be interpreted as affecting video standards. There was no objection to his suggestion.

ACTION: Approved Councilmember Subin's amendment to §4(g), Rebate Policy, as amended by Councilmember Leventhal, to delete in the first line, the first paragraph, on page 7 of the staff memorandum, the words [under normal working conditions] and in the last sentence of that paragraph, the words [upon request by the subscriber].

Councilmember Subin made the motion.

With respect to the amendment proposed by Councilmember Silverman for §6, Enforcement, Councilmember Praisner explained the proposed amendment, the Committee's support for maintaining the existing remedies as provided under the franchise agreements, its request for information on the levels of fines and types of remedies currently provided, and on how the Office of Cable and Communication Services implements these remedies.

Councilmember Silverman said that the enforcement remedies in the Executive Regulation involve revoking or terminating the franchise agreement. He said that although he supports levying fines for violations of customer service standards, he is concerned that a large amount of complaints within a short period of time might trigger the revocation of the franchise under § 14(f) of the cable franchise agreements. Mr. Silverman noted the impact that this would have on all of Comcast's cable customers. He said that as an alternative, he is attempting to find a way to impose liquidated damages for violations.

Councilmember Praisner said that she understands Mr. Silverman's point and she cannot perceive of a situation in which she would want to terminate a franchise agreement but she would like the option of doing so. She said that in the event that something becomes so egregious, she believes it is important for the County to have the ability to exercise that right in exchange for the right that the County has given to the cable company to operate in the County. She said that she would like to incorporate that check and balance into the Executive Regulation, noting that it does not hurt the cable companies or the County.

Mr. Pasternak suggested as a reasonable alternative, the use of the increased fines for customer service standard violations that were imposed in the transfer agreement from Prime Communications to Comcast. He said that the fines were imposed on a sliding scale, beginning with \$500 for the first violation and increased to \$5,000 and \$10,000 for violations occurring during a specified period of time.

Councilmember Praisner said that she is not opposed to increasing the fines for violations, but believes that the ability to terminate or revoke a franchise should be retained. During discussion, Ms. Praisner pointed out that the issue and debate of open access over cable modem predated the introduction of Bill 28-02, Cable Communications – Amendments, which required regulations to be written for cable modem service. Mr. Pasternak noted the need for the Council to consider the impact of standards and potential penalties on the ability of cable companies to operate and obtain financing in view of the fact that the County is likely to be one

of the first counties in the country to impose standards on cable modem service. Councilmember Silverman reiterated his concern about the impact on cable customers if the County should terminate or revoke the franchise agreement. He expressed the view that this is a remedy that the County will never use and he believes it should not be retained as a potential remedy. Councilmember Perez stated that he believes that the existence of a remedy that is unlikely to be used can be a good deterrent, but he will support the alternative proposed by Mr. Pasternak that provides for increased fines for customer service standard violations.

Councilmember Silverman revised his proposed amendment to substitute increased fines for customer service standard violations, to divide the language concerning written notice into two separate sentences as proposed by Council staff, and include language to ensure that the enforcement section of the Executive Regulation is not construed to preclude the rights of subscribers under County law.

ACTION: Defeated Councilmember Silverman's proposed amendment for §6, Enforcement, as amended and described above.

Councilmember Silverman made the motion.

YEAS: Floreen, Subin, Knapp, Silverman

NAYS: Denis, Leventhal, Andrews, Praisner, Perez

Councilmember Leventhal said that he voted against the motion because he believes his position on notification of customers and on penalties for violations for customer service standards should be the same. Mr. Leventhal noted that he voted in support of Councilmember Knapp's proposed amendment to §4 (d), Interruptions of Service, because he was persuaded by Comcast that its notification requirements should be the same for both internet and video customers.

The Council reviewed the proposed technical amendment on page 9 of the staff memorandum that proposes to delete §3(2)iv. Definitions.

ACTION: Approved the deletion of §3(2)iv. Definitions, as recommended by the MFP Committee and the Executive Branch.

The MFP Committee made the motion.

SUBJECT: Legislative Session

See the legislative journal of this date for the minutes of the legislative session.

The Council recessed at 1:30 P.M. and reconvened at 2:05 P.M.

SUBJECT: **Public Hearing on Bill 18-04, Personnel – Retirement – Police**

ACTION: The public hearing was conducted. Persons wishing to submit additional information for the Council's consideration should do so by the close of business July 19, 2004.

SUBJECT: **Public Hearing on Expedited Bill 19-04, Personnel – Collective Bargaining – Police**

ACTION: The public hearing was held and the record was closed.

SUBJECT: **Public Hearing on a Special Appropriation to the FY05 Operating Budget of the Montgomery County Fire and Rescue Service for Outreach and Recruitment, in the Amount of \$200,000**

ACTION: The public hearing was held and the record was closed.

SUBJECT: **Legislative Session (Continued)**

See the legislative journal of this date for the minutes of the legislative session.

SUBJECT: **Public Hearing on a Special Appropriation to the FY05 Operating Budget of the Montgomery County Fire and Rescue Service for Outreach and Recruitment, in the Amount of \$200,000**

Councilmember Knapp, Lead Member for Fire and Rescue Services on the Public Safety (PS) Committee, presented the report of the Committee, as outlined in the addendum from Legislative Analyst Davidson, dated July 12, 2004.

Councilmember Subin spoke in support of the Committee recommendation to approve the special appropriation. He said that because there are many needs within the Department that should be addressed, the Committee did not believe the Fire Administrator would be able to fund the \$200,000 for outreach and recruitment without having a detrimental impact on the Department. Mr. Subin stated that the Committee did not support the County Executive's view that a special appropriation is not necessary at this time because it is early in FY05 and that he would make a determination in January on whether an appropriation is necessary. He said that outreach and recruitment is an important issue and one of the Council's top priorities.

Councilmember Praisner said that although she supports the recommendation to approve the special appropriator, she is concerned that within three weeks of the beginning of the fiscal year, the Council will be approving a special appropriation for \$200,000. She stated that it is important to keep track of the supplementals that are introduced and adopted, to identify its

impact on the budget and the reserve balance, and to know the fiscal implications for the next fiscal year. Ms. Praisner requested that staff prepare a rolling chart that identifies the ongoing costs beyond the current budget, including its impact on both the reserve and the budget balance for the current fiscal year.

Councilmember Perez expressed appreciation to the Committee for considering the issue expeditiously. He said that he is convinced that there is a commitment that will be sustained in addressing the challenges of recruiting and hiring individuals who are both well qualified and racially and ethnically diverse. Mr. Perez said five years ago, the Council allocated \$400,000 for outreach and recruitment efforts and now it is spending approximately one-half that amount. He said that the rescue side of the equation is 90% of the job, that community oriented fire and rescue works best, and that it is important that the County have a racially and ethnically diverse work force to carry out the education and prevention roles.

Councilmember Andrews spoke in support of the Committee recommendation, and expressed appreciation to Councilmember Perez for his initiative in this area. He said that the Committee concluded that the special appropriation was necessary in order to recruit and hire individuals who are well qualified and racially and ethnically diverse.

ACTION: Adopted Resolution 15-684, approving the subject special appropriation.

The Public Safety Committee made the motion.

SUBJECT: Legislative Session (Continued)

See the legislative journal of this date for the minutes of the legislative session.

The meeting adjourned at 4:00 P.M.

This is an accurate account of the meeting:

Mary A. Edgar, CMC
Clerk of the Council